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LEE LITIGATION GROUP, PLLC30 EAST 39TH STREET, SECOND FLOOR

NEW YORK, NY 10018

TEL: 212-465-1180

FAX: 212-465-1181

INFO@LEELITIGATION.COM

WRITER'S DIRECT: 212-465-1188
 cklee@leelitigation.com

August 5, 2013

VIA FAX (212)805-7991

The Honorable J. Paul Oetken, U.S.D.J.
 Southern District of New York
 500 Pearl Street
 New York, NY 10007

Re: Jimenez, et al. v. KLB Foods, Inc., et al.
Case No. 12-cv-6796

The Clerk of Court is Directed to:
 Term motion (doc. #)
☒ Doc. and File As: left

Dear Judge Oetken:

We are counsel to Plaintiffs. We write to oppose Defendants' request to file a motion to dismiss, and to respectfully request leave to file a motion for sanctions against Defendants' counsel, for the reasons stated below.

Defendants' Motion to Dismiss the Complaint Due to Plaintiffs' Alleged Legal Status as Undocumented Workers

Defendants' request to file a motion to dismiss the complaint based on Plaintiffs' alleged legal status is contrary to both the law of the Second Circuit and the Department of Labor's wage and hour enforcement policies. Undocumented workers are entitled to recover unpaid wages under the FLSA, despite the *Hoffman* and *Palma* decisions (which related to back pay under the National Labor Relations Act).

The U.S. Department of Labor has addressed Defendants' exact argument in Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastics* decision on laws enforced by the Wage and Hour Division (attached as **Exhibit A**), explaining: "The Department's Wage and Hour Division will continue to enforce the FLSA...without regard to whether an employee is documented or undocumented. Enforcement of these laws is distinguishable from ordering back pay under the NLRA...Under the FLSA...the Department (or an employee) seeks back pay for hours an employee has actually worked, under laws that require payment for such work." The *Hoffman Plastics* Court's "concern with awarding back pay for 'years of work not performed, for wages that could not lawfully have been earned' does not apply to work actually performed."

The courts, including the Second Circuit, have followed the Department of Labor's approach. See *Liu v. Donna Karan International, Inc.*, 2002 WL 1300260 (S.D.N.Y. 2002); *Flores, et al. v. Anjost Corp., et al.* No. 11 Civ. 1531 (S.D.N.Y. Aug 2, 2013) (the parties must submit a revised notice stating "...you have the right to

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participate in this action even if you are an undocumented immigrant or if you were paid in cash.”), citing *Kemper v. Westbury Operating Corp.*, No. 12 Civ. 895, 2012 WL 4976122, at *6 (E.D.N.Y. Oct. 17, 2012); *See also Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299 (11th Cir. 2013) (undocumented aliens may recover their unpaid wages under the FLSA); *Flores v. Albertson's, Inc.*, 2002 WL 1163623 (C.D. Cal. 2002). In *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219 (2d. Cir. 2006) the Second Circuit explained:

[A]n order requiring an employer to pay his undocumented workers the minimum wages prescribed by the [FLSA] for labor actually and already performed...does not...condone that violation or continue it. It merely ensures that the employer does not take advantage of the violation by availing himself of the benefit of undocumented workers' past labor without paying for it in accordance with minimum FLSA standards. *Id.*

The Secretary of Labor recently stated in Appellee's Amicus Brief in *Lucas, et al v. Jerusalem Café, LLC, et al.*, No. 12-2170 (8th Cir. July 29, 2013), “the only circuit court to address the question directly, *see Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988); numerous district courts...and the Secretary of Labor all agree: employers who unlawfully hire unauthorized aliens must otherwise comply with federal employment laws.” *Id.* at 7.

Thus, Defendants' request to file a motion to dismiss must be denied.

Defendants' Motion to Dismiss the Complaint as Against Kunwar Bist

While Defendants seek leave to file a “motion to dismiss” against individual defendant Kunwar Bist, what they are actually seeking is a motion for summary judgment, as the issue of whether a defendant is an employer under the Fair Labor Standards Act (“FLSA”) is a factual issue. Under the ‘economic reality’ test, the relevant factors include whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment and (4) maintained employment records. No one factor is dispositive but the economic reality test encompasses the totality of the circumstances.

Defendants' counsel's blanket denial of Mr. Bist's employer status is not enough to award summary judgment (or dismissal). In fact, Defendant Bist testified in his deposition to the following:

1. He had the power to hire employees (Bist Dep. Tr.¹ at 14-15);
2. He had the power to fire employees (Bist Dep. Tr at 14, 16-17);
3. He personally pays the employees (Bist Dep. Tr. at 22);
4. He maintains employment records, work schedules (Bist Dep. Tr. at 27:18-23), payment slips and attendance register (Bist Dep. Tr. 34-35);

¹ Referenced pages of the Deposition Transcript of Kunwar Bist are attached hereto as Exhibit B.

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5. As the owner, he is in charge of wage and hour compliance (Bist Dep. Tr. at 32-33).

Further, Ranu Rawat testified in his Deposition that he and Mr. Bist had the power to hire and fire employees, determine salaries, set employee's work schedules and maintain the employee records (Rawat Dep. Tr.² at 8:18-10:4).

For the reasons stated above, Defendants' request must be denied.

Plaintiffs' Motion for Sanctions

Fed. R. Civ. P. 11(b) provides in relevant part:

By presenting to the court ... a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances ... the claims, defenses, and other legal contentions therein are warranted by existing law ... [and that] the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Fed. R. Civ. P. 11(b). If, after notice and a reasonable opportunity to respond, the court determines that the standards set forth in section (b) have been violated, the court may impose sanctions upon the attorneys, law firms, or parties. See Fed. R. Civ. P. 11(c), FN 26.

A pleading, motion or other paper violates Rule 11 either when it " 'has been interposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well-grounded in fact and warranted by existing law....' " *W.K. Webster & Co. v. American President Lines, Ltd.*, 32 F.3d 665, 670 (2d Cir. 1994) (quoting *Eastway*, 762 F.2d at 254).

In the instant action, Plaintiff requests that the Court impose sanctions on Defendants' counsel as he failed to conduct reasonable inquiry into the law before filing his pre-motion request. Had he done so, he would have determined that such request would be denied. Further, after receipt of Defendants' pre-motion conference letter, we wrote to Defendants' counsel, provided him with the relevant law and the opportunity to withdraw his request, and advised that if his request was not withdrawn, we intended to seek sanctions (see Exhibit D). Defendants refused to withdraw their request. As such, we respectfully request a pre-motion conference and for leave to file a motion for sanctions.

Respectfully,

/s/ C.K. Lee, Esq.

cc: All parties via Email

² Referenced pages of Rawat Deposition Transcript are attached hereto as Exhibit C.

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(FAX)

P.004/013

U.S. Department of Labor
Wage and Hour Division



U.S. Wage and Hour Division

(Revised July 2008)

Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division

On March 27, 2002, the U.S. Supreme Court ruled in **Hoffman Plastic Compounds, Inc. v. NLRB**, No. 00-1595 (S. Ct.), that the National Labor Relations Board (NLRB) lacked authority to order back pay to an undocumented worker who was laid off from his job because of union activities.

In **Hoffman Plastics**, the Supreme Court decided that providing back pay to the undocumented worker would conflict with policies under U.S. immigration laws. Those laws require employees to present documents establishing their identity and authorization to work at the time they are hired. An employer must check those documents and cannot knowingly hire someone who is not authorized to work. In **Hoffman Plastics**, the employee presented false documentation when he was hired. He was later laid off for trying to organize a union, in violation of the National Labor Relations Act (NLRA). The NLRB sought back pay for a period of time after the layoff. The Supreme Court concluded that back pay should not be awarded "for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."

The Supreme Court's decision does not mean that undocumented workers do not have rights under other U.S. labor laws. In **Hoffman Plastics**, the Supreme Court interpreted only one law, the NLRA. The Department of Labor does not enforce that law. The Supreme Court did not address laws the Department of Labor enforces, such as the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), that provide core labor protections for vulnerable workers. The FLSA requires employers to pay covered employees a minimum wage and, in general, time and a half an employee's regular rate of pay for overtime hours. The MSPA requires employers and farm labor contractors to pay the wages owed to migrant or seasonal agricultural workers when the payments are due.

The Department's Wage and Hour Division will continue to enforce the FLSA and MSPA without regard to whether an employee is documented or undocumented. Enforcement of these laws is distinguishable from ordering back pay under the NLRA. In **Hoffman Plastics**, the NLRB sought back pay for time an employee would have worked if he had not been illegally discharged, under a law that permitted but did not require back pay as a remedy. Under the FLSA or MSPA, the Department (or an employee) seeks back pay for hours an employee has actually worked, under laws that require payment for such work. The Supreme Court's concern with awarding back pay "for years of work not performed, for wages that could not lawfully have been earned," does not apply to work actually performed. Two federal courts already have adopted this approach. See *Flores v. Albertson's, Inc.*, 2002 WL 1163623 (C.D. Cal. 2002); *Liu v. Donna Karan International, Inc.*, 2002 WL 1300260 (S.D.N.Y. 2002).

The Department of Labor is still considering the effect of **Hoffman Plastics** on other labor laws it enforces, including those laws prohibiting retaliation for engaging in protected conduct.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243). Information about the FLSA and MSPA is also available on the Internet.

EXHIBIT A

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1 KUNWAR BIST
 2 A. Yes, we can discuss it on the phone
 3 also.
 4 Q. And then you would make a
 5 consolidated decision?
 6 A. Yes.
 7 Q. How about hiring and firing
 8 employees, can you hire somebody on your own?
 9 A. Yes, Ranu and I will make a joint
 10 decision to hire someone.
 11 Q. You and Ranu can hire somebody?
 12 A. Yes.
 13 Q. What if Ranu is not around, can you
 14 hire somebody?
 15 A. It depends on how bad the need is.
 16 Q. So you could if you wanted to if
 17 Ranu is not around?
 18 A. Yes, but I will discuss it with him
 19 on the phone that I'm making this decision.
 20 Q. If you can't catch him on the
 21 phone, can you make the decision yourself?
 22 MR. CHAUBEY: Mr. Lee, you're asking
 23 all the questions. I'm just objecting not
 24 --
 25 A. If I don't get him on the phone one

Page 16

1 KUNWAR BIST
 2 MR. LEE: I'm not leading. I'm
 3 talking, and I can lead if I want.
 4 MR. CHAUBEY: No.
 5 MR. LEE: So sit on the side and stop
 6 talking.
 7 MR. CHAUBEY: But I will --
 8 MR. LEE: Stop talking.
 9 MR. CHAUBEY: You can do anything, but
 10 you cannot ask a hypothetical question.
 11 MR. LEE: Of course I can.
 12 MR. CHAUBEY: It is on record. You
 13 can move forward. Over my objection these
 14 hypothetical questions.
 15 Q. Have you ever fired employees?
 16 A. No, mostly people leave on their
 17 own.
 18 Q. You have never terminated an
 19 employee?
 20 A. No.
 21 Q. If you wanted, can you fire an
 22 employee?
 23 A. I have to find out what the mistake
 24 was and what the grounds were and talk to people
 25 about it.

Page 15

1 KUNWAR BIST
 2 day, I can wait until I get him on the phone the
 3 next day and ask him.
 4 Q. Let's say you saw an employee --
 5 MR. CHAUBEY: I'm going to object to
 6 this line of questioning. If you want to
 7 do anything because these are not even the
 8 part of your complaint. It is beyond
 9 scope of -- you are asking a hypothetical
 10 question when my client has already
 11 answered that he has to make a decision
 12 with his client --
 13 MR. LEE: Stop. Stop with your
 14 running objections. All you have to say
 15 is you object, and you sit in the corner
 16 and you stop talking because it's my
 17 deposition.
 18 MR. CHAUBEY: I know but I'm objecting
 19 to the form.
 20 MR. LEE: That's all you have to say.
 21 That's all you have to say.
 22 MR. CHAUBEY: You are leading.
 23 MR. LEE: Shut up. That's all you
 24 have to say.
 25 MR. CHAUBEY: You're leading.

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1 KUNWAR BIST
 2 Q. If there were grounds for
 3 termination, can you terminate an employee?
 4 A. I could speak with them to do it.
 5 Q. But let's say somebody was
 6 performing really poorly, can you fire them?
 7 A. I would try to make him understand
 8 or make him understand how to do things better.
 9 Q. What if they don't improve?
 10 MR. CHAUBEY: These are all
 11 hypothetical questions. Over my
 12 objection.
 13 Q. What if they don't improve?
 14 A. I will tell him if you can't
 15 improve, you can leave.
 16 Q. If an employee comes to you and
 17 says, "Oh, can I change my schedule from Friday
 18 to Saturday," can you accommodate him?
 19 A. I would suggest that the person
 20 you're working with, your partner, you can
 21 mutually come to agreement, and that can be
 22 arranged.
 23 Q. If somebody asked if they could
 24 take a couple of days off because they had a
 25 death in the family, can you make a decision to

5 (Pages 14 to 17)

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1 KUNWAR BIST
2 accommodate?
3 A. Yes, of course.
4 Q. If somebody asked you if they could
5 work more hours because they needed the extra
6 work to earn more money, can you make the
7 decisions to accommodate?
8 A. No, I would rather hire an
9 additional person rather than give one person
10 more hours.
11 Q. Do you own any other businesses
12 other than Andaz Restaurant?
13 A. No.
14 Q. Is Andaz Restaurant the only source
15 of your income?
16 A. That's it, only Andaz.
17 Q. Are you married?
18 A. Yes.
19 Q. Does your wife work also?
20 A. No.
21 Q. So you're the sole breadwinner of
22 the family?
23 A. Yes.
24 MR. LEE: Mark this, please.
25 (Bist Exhibit 1 was marked on the

Page 20

1 KUNWAR BIST
2 Q. Is there any reason to think that
3 the information in the tax returns would be
4 incorrect?
5 A. No.
6 MR. LEE: Mark these.
7 (Bist Exhibit 2 and 3 were marked on
8 the record.)
9 Q. I'm showing the witness what's
10 marked as Bist Exhibit 2 and Bist Exhibit 3
11 which are tax returns for the years 2011 and
12 2012 respectively. I'm pointing out to the
13 gross revenues numbers for 2011.
14 Under Bist 2 it says, "\$688,000."
15 Is there any reason that number is
16 incorrect?
17 A. Yes, my accountant provided it.
18 Q. And you think the number is
19 correct, right?
20 A. I'll have to double check, but this
21 is the numbers that are in here. That's
22 correct.
23 Q. And the same with 2012, right,
24 based on your understanding, the gross revenues
25 for 2012 is \$719,000 and you think this number

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1 KUNWAR BIST
2 record.)
3 Q. I'm showing the witness what's
4 marked as Bist Exhibit 1.
5 A. Yes.
6 THE INTERPRETER: He needs to get his
7 glasses.
8 MR. CHAUBEY: I told him that he
9 should take his glasses to review the
10 documents. You can take a moment to
11 review the documents, and Mr. Lee will ask
12 questions based on your review.
13 MR. LEE: Off the record.
14 (An off the record discussion was held
15 at this time.)
16 Q. What's marked as Bist Exhibit 1 is
17 a tax return form for the year 2010 for KLB
18 Foods, Inc.; is that correct?
19 A. Correct.
20 Q. Is that the first year that KLB
21 Foods, Inc. filed tax returns?
22 A. Yes.
23 Q. So it has its gross revenues as
24 \$606,000; is that correct?
25 A. Yes, I provided these numbers.

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1 KUNWAR BIST
2 is correct also, right?
3 A. I provided the accountant with the
4 numbers, but I don't remember the numbers now,
5 but he's the one who made these documents so I
6 believe it's correct.
7 Q. Great. Thank you.
8 When you hire a new employee, what
9 kind of forms do you have them fill out?
10 A. I-9.
11 Q. What else?
12 A. And we ask for the Social Security
13 number.
14 Q. Anything else?
15 A. No.
16 MR. LEE: Mark this.
17 (Bist Exhibit 4 and 5 were marked on
18 the record.)
19 Q. I'm showing the witness what's
20 marked as Plaintiff's Exhibit 4, Bist Exhibit 4.
21 I just wanted to make the record
22 clear, Bist Exhibit 4 is a six-page document
23 that's also paginated P1 through P6.
24 MR. CHAUBEY: P7, P8 you are not
25 showing at this time?

6 (Pages 18 to 21)

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1 KUNWAR BIST
 2 MR. LEE: That's right.
 3 MR. CHAUBEY: No, because I --
 4 MR. LEE: Yeah.
 5 Q. Can you tell me what the document
 6 on the first page is?
 7 A. It's a delivery order.
 8 Q. Great. Thank you.
 9 How come there's no line item or
 10 tip on the delivery order?
 11 A. The credit card slip which
 12 accompanies this has the line item for tips.
 13 Q. Now, I'm showing the witness pages
 14 P4 and P6.
 15 Can you tell me what these
 16 documents are? They're photocopies of little
 17 slips of paper with handwriting on it. I'm
 18 going to give you an example. This is what the
 19 original looks like.
 20 A. It's okay, yes.
 21 Q. Do you know what these are?
 22 A. Yes, the weekly salaries that I
 23 give, that's originally here.
 24 Q. So you write the amount that you
 25 pay on a slip of paper, and you give it to the

Page 24

1 KUNWAR BIST
 2 weekly cash payments made to a person named
 3 Jose; is that right?
 4 A. Yes, correct.
 5 Q. And they generally say about \$105
 6 per week; is that right?
 7 A. Sometimes it's less. Sometimes
 8 it's \$85 when he's working for less hours, yeah.
 9 Q. But when he's working his full
 10 schedule, he gets \$105?
 11 A. Yes.
 12 MR. LEE: Mark this, please.
 13 (Bist Exhibit 6 was marked on the
 14 record.)
 15 Q. I'm showing the witness what's
 16 marked as Exhibit 6. They are also Bates
 17 stamped D1 through D86. It wasn't Bates stamped
 18 when I got it, but I went ahead and did it so I
 19 could keep track.
 20 Can you go ahead and look at this?
 21 A. Yes.
 22 Q. There's a set of documents from D1
 23 through D32.
 24 Can you tell me what these
 25 documents are?

Page 23

1 KUNWAR BIST
 2 employees along with a cash payment; is that
 3 right?
 4 A. Yes, because these people have not
 5 -- did not fill out the I-9 forms. That is why
 6 I had to give these people cash.
 7 Q. At least for the people listed on
 8 P4 and P6, it would be I guess Baltazar, you
 9 gave them a cash payment of \$105, right?
 10 A. Yes, that's the salary agreement.
 11 Q. Is that a weekly salary for
 12 Baltazar?
 13 A. Yes.
 14 Q. For this person Jose on P6, you
 15 also I guess give him \$105 weekly?
 16 A. Yes.
 17 Q. I'm showing the witness what's
 18 marked as Bist 5, a two-page document also
 19 marked also P7 and P8 as pagination numbers.
 20 A. Yes.
 21 Q. On Bist Exhibit 5 there's a
 22 photocopy of I guess another delivery slip; is
 23 that right, on the left-hand corner?
 24 A. Yes.
 25 Q. And also photocopied are I guess

Page 25

1 KUNWAR BIST
 2 A. These people on pages 1 to 32 are
 3 people who worked on an hourly basis. These
 4 people used to come in the evenings and work for
 5 two and a half hours every day, sometimes six
 6 days.
 7 Q. So let me ask the questions one at
 8 a time.
 9 Is this your handwriting from D1
 10 through D32?
 11 A. No, it's not mine.
 12 Q. Who handwrote this?
 13 A. Ranu.
 14 Q. But you're familiar with this
 15 document also, right?
 16 A. Yes, this is a salary slip. You
 17 see, the signature slips are here.
 18 Q. Do you mark in the Ps and the As on
 19 this form?
 20 MR. CHAUBEY: Mr. Lee, he has already
 21 said he doesn't write it, so if you're
 22 asking this question --
 23 MR. LEE: I'm just asking him to
 24 clarify.
 25 Q. Do you fill out the Ps and the As?

7 (Pages 22 to 25)

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KUNWAR BIST

- 1
2 A. No, not mine.
3 Q. Who does that?
4 A. Ranu did it.
5 Q. Ranu Rawat?
6 A. Yes.
7 Q. Can you tell me what the Ps mean?
8 A. Present.
9 Q. And A means absent?
10 A. Yes.
11 Q. If there are certain blanks, does
12 that mean they are not scheduled for the blank
13 shift?
14 A. They did not come those days.
15 Q. So each person was an afternoon and
16 an evening shift; is that right?
17 A. Yes, correct.
18 Q. Can you tell me what the shift
19 hours are?
20 A. Morning 11:00 a.m. to 3:00 p.m. and
21 5:00 to 10:30 p.m. In winter it's still
22 10:30 p.m. and in summer we close at 11:00,
23 don't take any orders after 11:00.
24 Q. When you say summer, when does the
25 summer schedule start?

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KUNWAR BIST

MR. CHAUBEY: Let him explain.

- 1
2
3 A. Regular staff when they get the
4 salary, they get a slip and the hours and
5 details.
6 Q. For the plaintiffs in this case,
7 how come you haven't provided that?
8 A. Because they did not fill out the
9 I-9 form, and they did not give me the filled
10 I-9 form.
11 Q. So for the plaintiffs on this case
12 you don't have these forms but you're saying you
13 have them for other employees; is that right?
14 A. Yes, that's correct.
15 Q. Do you know what the claims are
16 against you on this case?
17 A. Yes, I do know.
18 Q. What are the claims?
19 A. They have claimed that they worked
20 longer hours.
21 Q. Do you know the names of the
22 plaintiffs on this case?
23 A. Yes.
24 Q. Tell me who they are.
25 A. One is Jose.

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KUNWAR BIST

- 1
2 A. From May to August.
3 Q. Do employees work between 3:00 to
4 5:00 p.m.?
5 A. No, the restaurant is closed at
6 that time.
7 Q. But do they work even though the
8 restaurant is closed?
9 A. No, nobody works.
10 Q. Not even kitchen workers?
11 A. Not even.
12 MR. LEE: Mr. Chaubey just spoke
13 something in Hindi to his witness, and
14 it's improper for him to be doing that
15 while we're on the record.
16 MR. CHAUBEY: I'm sorry, but I did say
17 Hindi. That is true.
18 Q. So other than the time schedules
19 that you have provided on D1 through D32, are
20 there other work schedules that show the hours
21 worked of the employees? Because these actually
22 don't show the actual hours worked.
23 A. Yes, I have it.
24 Q. Where are they, how come I don't
25 have them?

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KUNWAR BIST

- 1
2 Q. Do you know his last name?
3 A. I don't know his last name.
4 Q. Who else?
5 A. Carrasco.
6 Q. Well, Carrasco is his last name.
7 Do you know his first name?
8 A. I don't know his first name.
9 Q. Who else?
10 A. Baltazar.
11 Q. Do you know the last name?
12 A. No, I don't.
13 Q. Anybody else?
14 A. No one else.
15 Q. How about Candido Merino?
16 A. I don't know what Candido has said.
17 I don't know about him.
18 Q. Do you know that he's part of the
19 lawsuit also?
20 A. Recently I found out.
21 Q. What are their claims against you?
22 A. They are lying, and they told me
23 that they worked more hours.
24 Q. You said the afternoon shift is
25 11:00 to 3:00; is that right?

8 (Pages 26 to 29)

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1 KUNWAR BIST
 2 A. Yes.
 3 Q. Do employees actually get in before
 4 11:00?
 5 A. No.
 6 Q. And the schedule that you
 7 mentioned, is it for every day of the week or is
 8 it something different?
 9 A. It keeps changing. Our holidays
 10 keep changing.
 11 Q. But generally it's the hours that
 12 you said earlier?
 13 A. Yes.
 14 Q. I'm sorry, can you verbalize what
 15 the specific claims are for the plaintiffs on
 16 this case?
 17 MR. CHAUBEY: If you know.
 18 Q. If you know.
 19 A. I do know, yes.
 20 Q. What are Jose's Jimenez's claims?
 21 A. Jose had said that he has worked
 22 more hours.
 23 Q. What else?
 24 A. And he also said that he has worked
 25 in the kitchen whereas they don't know how to

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1 KUNWAR BIST
 2 A. Yes. When they came they were told
 3 that they will be working two and a half hours
 4 per day, and it was a fixed salary for those two
 5 and a half hours.
 6 Q. What was the hourly rate?
 7 A. \$5.65, something like that plus
 8 tips.
 9 Q. Jose said that he started working
 10 for you in August 2011; is that true?
 11 A. I don't remember the exact date.
 12 Q. Are you in charge of, as the owner,
 13 do you try to comply with wage and hour laws?
 14 A. Yes, that is why people who work
 15 with tips it's \$5.65 an hour.
 16 Q. What have you done to ensure that
 17 your employees are paid properly?
 18 A. If I don't give them a salary, they
 19 won't work for me.
 20 Q. Have you investigated how to comply
 21 with state and federal employment laws?
 22 A. I was paying them the salaries
 23 according to those laws.
 24 Q. Did you read the law yourself or
 25 did you investigate with an advisor?

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1 KUNWAR BIST
 2 prepare Indian food.
 3 Q. Let me be a little bit more
 4 specific.
 5 In the first amended complaint on
 6 this case, Mr. Jimenez stated that he worked
 7 from 4:30 to 11:00 seven days a week; is that
 8 true?
 9 A. It's incorrect.
 10 Q. What was his working schedule?
 11 A. The three or four people in that
 12 time slot of deliveries, one who was working
 13 from 5:00 to 7:30, then 6:00 to 8:30 and another
 14 guy 8:30 to 11:00.
 15 Q. So what was Jose Jimenez's
 16 schedule?
 17 A. They used to keep changing between
 18 themselves every week.
 19 Q. You're saying the three delivery
 20 guys?
 21 A. Sometimes there were also four
 22 delivery people, and in that case they used to
 23 work six days a week.
 24 Q. You're saying he only worked two
 25 and a half hours per day?

Page 33

1 KUNWAR BIST
 2 A. Yes, whatever the CPA advised, I
 3 did that.
 4 Q. You're saying your CPA advised you
 5 on how to comply with state and federal wage and
 6 hour laws?
 7 A. Yes, he is the one who reads and
 8 understands it and prescribes the salary.
 9 Q. To you?
 10 A. Yes.
 11 Q. Who is your CPA?
 12 A. I have to think of his name. Wait
 13 a second -- Mr. Raman.
 14 Q. What's his first name?
 15 A. This is his first name.
 16 Q. What's his last name?
 17 A. We know him by just this name.
 18 MR. LEE: Can you agree to provide his
 19 contact details?
 20 MR. CHAUBEY: Maybe see in the tax
 21 return if it will be there.
 22 MR. LEE: The tax return says RG
 23 Bookkeeping and Tax Service Inc.
 24 Q. Is that your CPA?
 25 A. That is it.

9 (Pages 30 to 33)

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1 KUNWAR BIST
 2 Q. But I need his last name in order
 3 to subpoena him.
 4 A. I have provided you with the
 5 documents.
 6 MR. LEE: Can you agree to provide his
 7 full name?
 8 MR. CHAUBEY: I will provide his full
 9 name. That is not a big deal.
 10 Q. Is Mr. Jimenez still employed by
 11 you?
 12 A. No.
 13 Q. When did he stop working for you?
 14 A. I don't remember the exact date.
 15 Q. Do you have a record of when he
 16 left?
 17 A. Yes, I have slips like this, and
 18 it's written on the slips when he left work and
 19 the attendance register.
 20 Q. Can you show me on the attendance
 21 register when he stopped working for you?
 22 A. I don't have it with me here now.
 23 MR. LEE: Mr. Chaubey, can you agree
 24 that he'll supplement his attendance
 25 records to show when Mr. Jose Jimenez was

Page 36

1 KUNWAR BIST
 2 yes.
 3 MR. LEE: The witness is pointing to
 4 what's marked as Exhibit 6. He would have
 5 a schedule that would show similar to what
 6 is in Exhibit 6, a schedule showing when
 7 the plaintiffs started work and ended
 8 work.
 9 Q. Vicente Carrasco, he was paid a
 10 fixed weekly salary \$105 per week; is that
 11 right?
 12 A. That's correct.
 13 Q. Was his working schedule 4:30 to
 14 11:00 for seven days a week?
 15 A. No, the restaurant opens at 5:00,
 16 and they all have two and a half hour shifts
 17 each.
 18 Q. Were all the plaintiffs delivery
 19 guys?
 20 A. Yes.
 21 Q. All four plaintiffs were delivery
 22 people, right?
 23 A. Three.
 24 Q. Jimenez was delivery, Carrasco was
 25 delivery.

Page 35

1 KUNWAR BIST
 2 hired and when he was terminated?
 3 MR. CHAUBEY: Yes, I will.
 4 Q. For Vicente Carrasco, did he start
 5 working for you in January 2012?
 6 A. I don't remember the exact dates,
 7 but he has worked with me.
 8 MR. LEE: Just to kind of speed things
 9 along, Mr. Chaubey, can you agree to
 10 provide the attendance records for all the
 11 four plaintiffs, Jimenez, Carrasco,
 12 Sanchez and Merino? I don't think the
 13 witness will remember.
 14 MR. CHAUBEY: I will.
 15 MR. LEE: Mr. Chaubey has agreed that
 16 he will provide attendance records that
 17 reflect the hire and fire dates.
 18 MR. CHAUBEY: Definitely.
 19 Q. So you believe you have them; is
 20 that right?
 21 A. Yes, I kept them.
 22 MR. CHAUBEY: He's saying, is that
 23 something like this which you are
 24 mentioning?
 25 THE WITNESS: Something like this,

Page 37

1 KUNWAR BIST
 2 How about Sanchez, was he delivery?
 3 A. Candido was a dishwasher prior, and
 4 then he started delivery.
 5 Q. So what about Baltazar Sanchez, was
 6 he working two and a half hours per day?
 7 A. Yes.
 8 Q. How many days a week did he work?
 9 A. Sometimes five days, sometimes six
 10 days, sometimes seven days.
 11 Q. Is that the same for Vicente
 12 Carrasco?
 13 A. Correct, same.
 14 Q. And the same for Jose Jimenez,
 15 correct?
 16 A. That's correct.
 17 Q. Based on your records, right?
 18 A. Correct.
 19 Q. How about Candido, his working
 20 schedule?
 21 A. Candido was later on doing delivery
 22 also. It was the same kind of schedule.
 23 Q. Was he paid \$105 also?
 24 A. Yes, if he was working seven days,
 25 he would get \$105. It would be less if it was

10 (Pages 34 to 37)

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Page 6

1 RANU RAWAT
 2 I F F A T H U S S A I N, called as the
 3 interpreter in this matter, was duly sworn by
 4 a Notary Public of the State of New York to
 5 accurately and faithfully translate the
 6 questions propounded to the witness from
 7 English into Hindi and the answers given by
 8 the witness from Hindi into English.
 9
 10 RANU RAWAT called as a witness,
 11 having been first duly sworn by Ashley Cohen,
 12 a Notary Public within and for the State of
 13 New York, was examined and testified as
 14 follows:
 15 EXAMINATION BY
 16 MR. LEE:
 17 Q. State your name for the record,
 18 please.
 19 A. Ranu Rawat.
 20 Q. Good afternoon. My name is C.K.
 21 Lee. I'm counsel to the plaintiffs.
 22 Do you speak English?
 23 A. Somewhat, yes.
 24 Q. If you can understand me and you
 25 want to respond in English and just use a

Page 8

1 RANU RAWAT
 2 Q. The restaurant is operated by a
 3 company called KLB Foods; is that right?
 4 A. Correct.
 5 Q. And you're a shareholder in KLB
 6 Foods I think, right?
 7 A. Correct.
 8 Q. And the other shareholders are
 9 Aditya Patwal, Hari Singh, and Kunwar Bist?
 10 A. That's correct.
 11 Q. Mr. Bist I think is a 49 percent
 12 share holder; is that right?
 13 A. That's correct.
 14 Q. And the other two people including
 15 yourself are each 17 percent shareholders; is
 16 that right?
 17 A. That's correct.
 18 Q. You and Mr. Bist, you're in charge
 19 of operating the restaurant; is that right?
 20 A. Yes.
 21 Q. You and Mr. Bist can hire and fire
 22 employees; is that right?
 23 A. Mostly but we are partnership so we
 24 keep them in the decisions.
 25 Q. The other partners who are not

Page 7

1 RANU RAWAT
 2 translator if you need help, we can do it that
 3 way. It's up to you.
 4 A. I would rather go through the
 5 translator.
 6 Q. I just want to confirm your full
 7 legal name is R-A-N-U R-A-W-A-T?
 8 A. That's correct.
 9 Q. Do you go by any other names?
 10 A. No.
 11 Q. Is Ranu short for something?
 12 A. This is the full name.
 13 Q. What is your current address?
 14 A. 2358 38th Street, Apartment 1R,
 15 Astoria, New York 11105.
 16 Q. Are you familiar with a restaurant
 17 called Andaz?
 18 A. Yes, I work there.
 19 Q. What's the location of the
 20 restaurant?
 21 A. 1378 First Avenue New York, New
 22 York 10021.
 23 Q. And the restaurant has been there
 24 for how long?
 25 A. Its been running for four years.

Page 9

1 RANU RAWAT
 2 working day to day; is that right?
 3 A. That's correct.
 4 Q. They also participate in the
 5 decision making for who to hire and who to fire?
 6 A. Yes, we work together.
 7 Q. And also for the determining
 8 salaries, can you and Mr. Bist make the
 9 decisions as to determining salaries for
 10 employees?
 11 A. We work together, but we also ask
 12 our CPA for recommendations and to see if we're
 13 doing the right thing.
 14 Q. When you say we, is that you and
 15 Mr. Bist or you and all the other shareholders?
 16 A. All four of us.
 17 Q. In regards to employees' work
 18 schedules, do you and Mr. Bist make the
 19 decisions or do you and Mr. Bist and all the
 20 other shareholders make the decisions
 21 collectively?
 22 A. Mostly because the two of us are
 23 onsite, mostly it's between the two of us for
 24 work schedules.
 25 Q. And you and Mr. Bist maintain the

3 (Pages 6 to 9)

Page 10

Page 12

1 RANU RAWAT

2 employee records onsite?

3 A. Correct. Whatever it is, we do
4 keep it.

5 Q. You work full time at the
6 restaurant; is that right?

7 A. That's correct, five days a week.

8 Q. Does Mr. Bist also work full time?

9 A. When I'm not there he works full
10 time, but if I'm there he works -- he comes for
11 three or four hours.

12 Q. Per day?

13 A. It depends on when he can come.

14 Q. So the two days when you're not
15 there, he's there the full two days?

16 A. Three days.

17 Q. I thought you said you worked there
18 five days?

19 A. Yes.

20 Q. So that's two days a week you're
21 not there; is that right?

22 A. Correct.

23 Q. So the two days you're not there,
24 Mr. Bist is there the full days; is that right?

25 A. There is no such rules, but he

1 RANU RAWAT

2 attorney knows, Mr. Chaubey.

3 Q. What have you and Mr. Bist done to
4 make sure that you have complied with employment
5 laws?

6 A. We know that we're working
7 according to guidelines by the law because we
8 have been advised to believe correctly by our
9 CPA for the meaning of full-time employee and
10 what's the meaning of a part-time employee.

11 Q. Do you know who Hyatt is?

12 A. It's a female who was our employee.

13 Q. Do you know Hyatt's last name?

14 A. I don't remember at this moment.

15 Q. Do you know a person named Ahmad?

16 A. Yes.

17 Q. What is his last name?

18 A. Ahsan.

19 Q. Do you know a person named Sohail?

20 A. Yes, he still works with us. This

21 is his nickname. His other name is Nurul.

22 Q. Do you know the names of the
23 plaintiffs on this case?

24 A. Yes.

25 Q. Can you give me their names?

Page 11

Page 13

1 RANU RAWAT

2 tried his best to remain to be there.

3 Q. For the full day?

4 A. Correct.

5 Q. How many hours are you working
6 there when you're working a full day?

7 A. First I work 12:00 to 3:00 and then
8 5:00 to 9:30.

9 Q. So your working hours are 12:00 to
10 3:00 and 5:00 to 9:30?

11 A. Correct, from 12:00 to 3:00 and
12 5:00 to 9:30.

13 Q. Other than your business
14 relationship, do you have any other relationship
15 with Mr. Bist?

16 A. No.

17 Q. You're not related by marriage or
18 by blood?

19 A. No.

20 Q. Are you aware of the claims of the
21 plaintiffs against the restaurant?

22 A. Yes, we know that they filed a
23 lawsuit.

24 Q. Do you know what the claims are?

25 A. Some I know, and the rest my

1 RANU RAWAT

2 A. One is Jose, Carrasco.

3 Q. It's Vicente Carrasco?

4 A. Correct.

5 Q. And Jose Jimenez, right?

6 A. Yes.

7 Q. And Baltazar Sanchez?

8 A. That's correct.

9 Q. And Candido Merino?

10 A. Yes, correct.

11 Q. They were all delivery guys except
12 Candido was a dishwasher at that point?

13 A. Yes, Candido started as a
14 dishwasher, and then he became a delivery
15 person.

16 Q. So when an employee is hired, what
17 forms do you give them to fill out?

18 A. We try to get an I-9 form filled
19 out and given back to us.

20 Q. Anything else?

21 A. Nothing else.

22 Q. Do you ask employees that you hire
23 to sign any other forms other than the I-9 form?

24 A. No.

25 Q. Even now you only ask for an I-9

4 (Pages 10 to 13)

2013/08/06 12:18

(FAX)

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Subject: Jimenez v. KLB Foods Inc., et al.
From: anne@leelitigation.com
Date: Fri, Aug 02, 2013 12:57 pm
To: "Sanjay Chaubey" <chaubeylaw@gmail.com>
Cc: cklee@leelitigation.com
Attach: Immigration status- 8 clr 7-29-13-1.pdf

Sanjay:

We write to provide you with the opportunity to withdraw your pre-motion letter dated August 1, 2013.

Your argument that the FLSA does not apply to undocumented aliens is nonsensical and is contrary to the law. See *Lucas v. Jerusalem Café, LLC*, No. 12-2170, attached. Further, as an attorney you should be fully aware that both the Second Circuit and the Department of Labor have repeatedly held that *Hoffman* is completely inapplicable to the FLSA and the enforcement of wage and hour laws.

Your argument that individual Defendant Blst is not the Plaintiffs' employer is clearly contradicted by the deposition testimony.

Please be advised that if you do not withdraw your frivolous pre-motion letter by Monday August 5, 2013 at 10:00 A.M., we will prepare our response which will seek reimbursement for our legal fees, against your firm personally.

Anne Seelig, Esq.
Lee Litigation Group, PLLC
30 East 39th St, Second Floor
New York, NY 10016
Email: anne@leelitigation.com
Direct: (212) 465-1124
Fax: (212) 465-1181

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